IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN AT JODHPUR.

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JUDGMENT

Ugar Singh.
vs.
Ram Niwas

S.B.CIVIL SECOND APPEAL NO.333/2005 UNDER SECTION 100 CPC AGAINST THE JUDGMENT AND DECREE DATED 29.7.2005 PASSED BY SHRI R.M. CHATURVEDI, ADDITIONAL DISTRICT JUDGE NO.1, BHILWARA IN APPEAL DECREE NO.13/1999.

DATE OF JUDGMENT ::: 22.2.2006

PRESENT

HON'BLE MR. PRAKASH TATIA, J.

Mr. LK Purohit, for the appellant.
Mr. JP Joshi, for the respondent.

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BY THE COURT:

Heard learned counsel for the parties.

Both the learned counsel for the parties submit that the substantial question of law involved in this appeal is as under :-

"Whether the first appellate court committed error of law in dismissing the appellant/tenant's two

applications filed under Order 6 Rule 17 by orders dated 6.5.2004 and 16.12.2004 and application filed under Order 41 Rule 27 CPC by order dated 7.2.2005 ?"

Learned counsel for the appellant submits that the first appellate court committed serious error of law in dismissing the appellant's two applications filed under Order 6 Rule 17 CPC whereby he sought permission to amend the written statement. Amendment of written statement was necessary as it had material bearing on the correct decision of the appeal as well as of the suit. It is also submitted that the first appellate court committed error of law in dismissing the application under Order 41 Rule 27 CPC by order dated 7.2.2005 on the ground that in case, the application is allowed, it will delay the proceedings. It is submitted that such cannot be a ground for denying the legitimate claim and defence of the defendant. It is also submitted that the first appellate court has erred in dismissing the amendment application on the ground that after amendment of CPC, the amendment cannot be allowed at appellate stage.

Learned counsel for the respondent fairly conceded that the rejection of the applications under Order 6 Rule 17 CPC merely on the ground that the amendment application cannot be considered and allowed by the first appellate court after the amendment of CPC is not correct. It is also submitted that in case, the first appellate court is directed to decide the applications of the appellant on

merits, then the respondent has no objection in setting aside the decree because without setting aside the decree passed by the first appellate court, those applications cannot be decided by the first appellate court.

In view of the above facts and in view of the settled legal position that the first appellate court could not have rejected the applications filed under Order 6 Rule 17 CPC merely on the ground that the first appellate court had no jurisdiction to consider and decide these applications merely because of the amendment made in the CPC in the year 2002. The first appellate court also committed serious error of law in rejecting the appellant's application under Order 41 Rule 27 CPC on the ground that it will delay the proceedings without considering the merits of the applications and all relevant facts for this purpose.

In view of the above, the substantial question of law is decided in favour of the appellant.

Learned counsel for the also argued that the first appellate court committed error of law in rejecting the prayer of the appellant for non-framing of the issue on the point of comparative hardship which is required under Section 14(2) of the Act of 1950.

I do not find any force in the submission of learned counsel for the appellant in view of the fact that the first appellate court decided the point of comparative hardship while deciding the bonafide necessity of the

landlord but since the judgment and decree of the first appellate court itself has been set aside in toto and the appeal will be decided by the first appellate court after deciding the applications of the appellant filed under Order 6 Rule 17 and Order 41 Rule 27 CPC. The question of comparative hardship will be considered afresh in the light of the orders which may be passed by the first appellate court on appellant's applications under Order 6 Rule 17 and Order 41 Rule 27 CPC.

Accordingly, this appeal is allowed, the judgment and decree of the first appellate court dated 29.7.2005 is set aside, the orders dated 6.5.2004, 16.12.2004 and 7.2.2005 are also set aside and the matter is remanded to the first appellate court with a direction to decide both the applications filed under Order 6 Rule 17 and application filed under Order 41 Rule 27 CPC on merits after hearing both the parties and thereafter to decide the appeal afresh without influenced by the earlier decision of appeal.

The record of the courts below be sent forthwith. Both the parties are directed to appear before the first appellate court on 21.3.2006.

(PRAKASH TATIA), J.

S.Phophaliya